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ALEXANDER L. STEVAS,
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(2)

No. 84-1506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

SUPPLEMENTAL APPENDIX

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Supreme Court of New Jersey

M-189 SEPTEMBER TERM, 1984
19,918

ORDER

AIRWORK SERVICE DIVISION,
Petitioner,
vs.
DIRECTOR, DIVISION OF TAXATION,
Respondent.

FILED
OCT 25 1984
Stephen W. Townsend
CLERK

No member who voted with the majority having moved the matter, the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of October, 1984.

Stephen W. Townsend

CLERK OF THE SUPREME COURT

Supreme Court of the United States

NO. A-538

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 22, 1985.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, AND A SUBSIDIARY OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT.

Tax Court of New Jersey

March 27, 1981.

SYNOPSIS

Proceeding was instituted to review a "Revised Final Determination" of the Director of the Division of Taxation imposing an assessment against the corporate taxpayer pursuant to the Sales and Use Tax Act. The Tax Court, Crabtree, J. T. C., held that: (1) compliance with the provisions of the Administrative Procedure Act concerning notice and hearing of proposed agency actions was not indispensible to the validity of the sales tax assessment in question; (2) failure to comply with the notice and hearing provisions of the Administrative Procedure Act did not operate to deny the taxpayer due process of law; (3) the Director was not estopped from assessing the tax retroactively even though the action was a reversal of an earlier position with respect to taxability of repair services on property destined for out-of-state delivery; (4) the governing statute, prior to its amendment, authorized the imposition of a sales tax upon receipts from repair services performed in New Jersey, notwithstanding out-of-state delivery of property upon which services were performed; (5) imposition of sales tax upon all repair services performed in New Jersey was not violative of equal protection and due process; and (6) absent evidence of actual multiple taxation, tax in question did not violate commerce clause in that it applied to all receipts from repair services performed within

New Jersey regardless of whether purchaser was a resident or nonresident and irrespective of destination of service property.

Motion of plaintiff for summary judgment denied, and motion of defendant for summary judgment granted.

James F. Keegan for plaintiff (*Gerald C. Neary, James F. Keegan* and *Pitney, Hardin & Kipp*, attorneys; *William Kevin Wright* on the brief).

Harry Haushalter for defendant (*John Degnan*, Attorney General of New Jersey, attorney; *Harry Haushalter* on the brief).

CRABTREE, J. T. C.

This is a sales tax case wherein plaintiff seeks review of a "Revised Final Determination" of defendant Director dated December 18, 1974, imposing an assessment of $628,255.31 (exclusive of interest and penalties) against plaintiff pursuant to the New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B–1 *et seq.* The period covered by the assessment is August 12, 1971 to June 30, 1973. Both parties have moved for summary judgment pursuant to *R.* 4:46.

The facts essential to disposition of the motions may be briefly stated.

From 1966 through and beyond the taxable periods in issue plaintiff has been engaged in the business of servicing and overhauling aircraft engines at its place of business in Millville, New Jersey. Upon completion of the work, which is performed entirely within this State, plaintiff ships the serviced or overhauled engines to its customers at their out-of-state locations.

The New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B–1 *et seq.* (the act), was passed on April 27, 1966, effective with respect to transactions therein specified occurring on or after July 1, 1966. *L.* 1966, *c.* 30, § 31. On or about June 28, 1966 the New Jersey Sales and Use Tax Bureau issued a press release containing 213 questions and answers concerning the act's interpretation. The release, reproduced in Report 162 of Commerce Clearing House *New Jersey Tax Reports* of July 11, 1966, included the following response to a question addressed to treatment of repair charges imposed with respect to property delivered to an out-of-state customer: "Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax."

On August 12, 1971 the Division of Tax Appeals promulgated its decision in the case of *Fisher-Stevens, Inc. v. Taxation Division,* Docket S.T. 109, holding that all sales of direct mailing services performed in New Jersey on mail to out-of-state addresses were subject to sales tax. The decision was affirmed by the Superior Court, Appellate Division. *Fisher-Stevens, Inc. v. Taxation Division,* 121 *N.J. Super.* 513, 298 *A.*2d 77 (App.Div. 1972), certif. den. 62 *N.J.* 575 (1973). In the *State Tax News,* a bi-monthly newsletter published by defendant and aimed at practitioners and large taxpayers, it was announced, in consecutive late-1973 issues, that the sales tax applied to repair services performed in New Jersey even though the serviced property was delivered outside of New Jersey for use outside of this State.

The New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B–1 *et seq.* (the APA), was enacted effective September 1, 1969. None of the rule-making provisions of the APA, including the requirement of notice and hearing before the promulgation of rules or regulations, were followed in connection with

defendant's publication of the aforementioned issues of *State Tax News*.

The issues are:

1. Is compliance with the APA provisions concerning notice and hearing of proposed agency actions indispensable to the validity of a tax assessment under the Sales and Use Tax Act?

2. Did defendant's failure to comply with the notice and hearing provisions of the APA deny plaintiff due process of law?

3. Did the act, as it stood during the taxable periods in issue, authorize the imposition of a sales tax upon repair services performed in New Jersey on property delivered outside New Jersey for use outside this State?

4. Does the imposition of a sales tax upon repair services to property destined for out-of-state delivery violate the Commerce or Equal Protection Clauses of the United States Constitution?[1]

I. The APA Issue

Plaintiff urges the invalidity of the assessment because it is based upon a rule not adopted in accordance with the APA. The "rule" which plaintiff contends was improperly adopted was the statement appearing in consecutive issues of *State Tax News* concerning defendant's interpretation of the act as applied to repair services performed in New Jersey on property destined for out-of-state shipment. The legal infirmity of defendant's action, says plaintiff, was the failure to give public notice and hearing of the *State Tax News* announcement, as required by *N.J.S.A.* 52:14B–4(d).

[1] While plaintiff advanced no contentions, either in its brief or in oral argument, concerning the Commerce Clause or the Equal Protection Clause, both the complaint and the pretrial order entered November 5, 1979 raise those issues and I will therefore deal with them in this opinion.

Plaintiff's argument is essentially a tightly constructed—and superficially compelling—Aristotelean syllogism whereunder plaintiff equates the *State Tax News* announcements with the APA definition of "rule" (*N.J.S.A.* 52:14B–2(e)), posits the inclusion of the Division of Taxation within the definition of "state agency" (*N.J.S.A.* 52:14B–2(a)), alludes to defendant's failure to comply with the notice and hearing requirements (*N.J.S.A.* 52:14B–4)), and then concludes that, as no rule is valid unless adopted in substantial compliance with those requirements (*N.J.S.A.* 52:14B–4(d)), the assessment here complained of is a nullity.

Unfortunately for plaintiff, its elegant syllogism must yield to the powers explicitly granted defendant by the taxing statute and settled judicial authority construing those powers. The defendant is authorized by § 24 of the act:

> 1. To make, adopt and amend rules and regulations appropriate to the carrying out of this act and the purposes thereof;
>
> . . . . . .
>
> and
>
> 6. To assess, determine, revise and readjust the taxes imposed by this act. . . .
> [*N.J.S.A.* 54:32B-24(1), (6)]

[1, 2] Defendant's authority to assess taxes is thus independent of the requirement to adopt rules and regulations, and his assessing authority is in no way contingent upon the promulgation of rules and regulations. This conclusion is supported not only by a sensible construction of the quoted portions of § 24 of the act, but also by an imposing line of judicial authority. *Securities and Exchange Comm'n v. Chenery Corp.*, 332 *U.S.* 194, 67 *S.Ct.* 1575, 91 *L.Ed.* 1995 (1947); *R. H. Macy & Co. v. Taxation Division*, 77 *N.J.Super.* 155, 185 *A.*2d 682 (App.Div. 1962), aff'd o. b. 41 *N.J.* 3, 194 *A.*2d 457 (1963); *In re Heller*, 73 *N.J.* 292, 374 *A.*2d 1191 (1977). In *Chenery* the court upheld

an SEC determination (disapproving a corporate reorganization plan) that was reached on an *ad hoc* basis and not by way of a formal regulation. The court stated that the absence of a general rule did not invalidate the SEC decision:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> . . . . . .
>
> . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . .. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforseeable situations. In performing its important functions in these respects, therefore, an adminstrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. [332 *U.S.* at 201–202, 67 *S.Ct.* at 1579–1580]

The *Chenery* principle was applied in *Macy*, a case especially apposite here since it involved tax assessments. In that case the court acknowledged the authority of the Director of the Division of Taxation to impose assessments in compliance with a statutory standard, without prior adoption of a rule or regulation,[2] saying:

> In any event, insofar as the argument before us is premised on the position that the Division of Taxation was powerless to exercise its statutory power to determine fair valuations of Macy's inventories as assets, in accordance with sound accounting principles, without *first* adopting a general rule

[2] Although the *Macy* case was decided seven years before the enactment of the APA, the New Jersey Constitution provided, during the tax years at issue (1956, 1957 and 1958) that no rule or regulation of a state agency, department, officer or authority could become effective until it was filed with the Secretary of State, *N.J. Const.*, Art. V. § IV, par. 6, a provision similar to that embodied in *N.J.S.A.* 52:4B-14(d), cited earlier in the text.

that all department stores must report and are to be taxed on the base of Fifo inventories, the contention is without merit. First, without more evidence, we cannot say that such a rule of unvarying application in all such cases would necessarily be appropriate. Second, and more important, there is, as we have decided, an adequate legislative standard in this act for administrative guidance, and in such case the development of subsidiary rules and principles on a case-by-case basis is not proscribed. [77 *N.J.Super.* at 180, 185 *A.*2d 682]

[3] The *Macy* decision is dispositive of the issue raised by plaintiff. The Legislature, by enacting *N.J.S.A.* 54:32B–3(b)(2), has delineated the standards to be applied by defendant in determining whether a particular service is subject to sales tax. In light of this standard, the Director was not required to reflect his policies explicitly in the form of a regulation before imposing the assessment in question. As noted in *Macy*, such a requirement would limit defendant's capacity to assess taxes, notwithstanding the existence of adequate legislative standards.

[4–6] The Legislature did not intend that the APA should impose unreasonable restraints upon the assessment of taxes by requiring that the validity of every assessment should be contingent upon the prior adoption of a regulation. Such an interpretation would require defendant to adopt regulations to meet every conceivable contingency that might arise in the context of future tax assessments, and would also jeopardize tax revenues which the Legislature directed the Division of Taxation to collect. The APA was not meant to supplant defendant's authority to assess and collect taxes, an authority explicitly granted to him by *N.J.S.A.* 54:32B–24(6). Indeed, the APA expressly excludes from its coverage "agency decisions and findings in contested cases," *N.J.S.A.* 52:14B–2(e)(3), a category which undeniably embraces tax assessments.

[7, 8] Plaintiff also contends that the publication of defendant's position in the *State Tax News*, without notice to plaintiff or the public, as allegedly required by the APA, denied

plaintiff due process of law. This contention is not well-founded. While it is true that a taxpayer must be given an opportunity, upon adequate notice, to challenge the validity of an assessment, due process only requires that such opportunity be afforded at some stage before a tax becomes irrevocably fixed as a charge on the taxpayer's property. *Central of Georgia R. R. Co. v. Wright,* 207 *U.S.* 127, 28 *S.Ct.* 47, 52 *L.Ed.* 134 (1907); 72 *Am.Jur.*2d, *State and Local Taxation,* § 782. Plaintiff's rights to due process are vindicated in the very proceeding hence under consideration; it has availed itself of the right to present its position in a lengthy written brief and extended oral argument thereon. Due process does not extend, however, to the alleged right of public participation by others, *Gallup v. Schmidt,* 183 *U.S.* 300, 22 *S.Ct.* 162, 46 *L.Ed.* 207 (1902), nor does it require that plaintiff be allowed to press its views as a *quasi*-legislative proceeding such as a rule-making hearing under the APA. *Williams v. Eggleston,* 170 *U.S.* 304, 18 *S.Ct.* 617, 42 *L.Ed.* 1047 (1898).

While plaintiff disavows reliance upon an estoppel theory, it appears nevertheless to argue for the application of that theory on the basis of the alleged reversal of defendant's position with respect to taxability of repair services on property destined for out-of-state delivery. Plaintiff seems to claim detrimental reliance upon defendant's earlier position, expressed in the June 28, 1966 press release, in that the sales tax was not collected from out-of-state customers prior to the reversal of defendant's position published in the late 1973 issues of *State Tax News.* The disputed assessment, of course, covers taxable periods prior to the *State Tax News* publication of defendant's position, but those periods did not antedate the date of the Division of Tax Appeals decision in the *Fisher-Stevens* case (August 12, 1971).

[9–11] The collection and enforcement of taxes is a strict governmental function and vitally affects the public interest. *State v. Erie Railroad Co.,* 23 *N.J.Misc.* 203, 42 *A.*2d 759

(Sup.Ct. 1945). *See East Orange v. Livingston,* 102 *N.J.Super.* 512, 522, 246 *A.*2d 178 (Law Div.1968), aff'd 54 *N.J.* 96, 253 *A*2d 546 (1969). The taxing authority is not bound or estopped by unauthorized acts of its officers, *Bayonne v. Murphy & Perrett Co.,* 7 *N.J.* 298, 81 *A.*2d 485 (1951), nor may estoppel be invoked in cases of agency acquiescence or reversals or modifications of prior positions. *Illinois Power Co. v. Mahin,* 49 *Ill.App.*3d 713, 7 *Ill.Dec.* 436, 364 *N.E.*2d 597 (App.Ct.1977), aff'd 72 *Ill.*2d 189, 21 *Ill.Dec.* 144, 381 *N.E.*2d 222 (Sup.Ct.1978); *Boswell v. Abex Corp.,* 294 *Ala.* 334, 317 *So.*2d 317 (Sup.Ct.1975). Moreover, a rule or regulation of a state tax commission purporting to exempt a taxpayer or a transaction from tax liability where authority to do so has not been specifically granted by the Legislature cannot operate as an estoppel to collect the tax, even in the case of transactions which have been closed so that the seller cannot collect the tax from the purchaser. *Crane Co. v. Arizona State Tax Comm'n,* 63 *Ariz.* 426, 163 *P.*2d 656 (Sup.Ct. 1945), overruled on other grounds *Duhame v. State Tax Comm'n,* 65 Ariz. 268, 179 *P.*2d 252 (Sup.Ct.1947).

[12, 13] Of some relevance here is the long-prevalent judicial attitude in federal tax cases, where claims of estoppel against the Commissioner of Internal Revenue because of his reversal of legal positions to the alleged detriment of taxpayers, have been viewed with a jaundiced eye. The settled rule, applied uniformly to all types of taxes, is that the Commissioner of Internal Revenue is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions, even where the taxpayer relied to his detriment on the Commissioner's mistake. *Automobile Club of Michigan v. Internal Revenue Comm'r,* 353 *U.S.* 180, 77 *S.Ct.* 707, 1 *L.Ed.*2d 746 (1957), reh. den. 353 *U.S.* 989, 77 *S.Ct.* 1279, 1 *L.Ed.*2d 1147 (1957); *Dixon v. United States,* 381 *U.S.* 68, 85 *S.Ct.* 1301, 14 *L.Ed.*2d 223 (1965); *Martin's Auto Trimming, Inc. v. Riddell,*

283 *F.*2d 503 (9 Cir., 1960); *Davar Products, Inc. v. United States,* 245 *F.Supp.* 460 (S.D.N.Y.1965); 10 *Mertens, Law of Federal Income Taxation* (1974 rev.), §§ 60.14, 60.16. The rule precluding estoppel against the Commissioner of Internal Revenue is applied even where the reversed determination was originally addressed specifically to the complaining taxpayer and with respect to a particular transaction or series of transactions. *Automobile Club of Michigan v. Internal Revenue Comm'r, supra; Massaglia v. Internal Revenue Comm'r,* 286 *F.*2d 258 (10 Cir. 1961).

The underlying rationale is cogently stated in *Dixon v. United States, supra:*

> This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. [at 85 *S.Ct.* 1304.]

The rule of the federal cases, resting, as it does, upon considerations of sound administration of the revenue laws, is applicable to the instant case.

[14–16] As will be seen from the discussion to follow, defendant's assessment was imposed in compliance with the legislative standard embodied in *N.J.S.A.* 54:32B–3(b)(2) (dealing among other matters, with a sales tax on repair services to tangible personal property). That standard cannot be vitiated by an erroneous construction thereof by the Division of Taxation, not even where the taxpayer proves detrimental reliance upon such construction. Neither defendant nor any official responsible to him is authorized to waive state tax revenues. *Boswell v. Abex Corp., supra.*

II. Merits of the Assessment

[17] Plaintiff contends that the activity which triggers application of the sales tax is delivery of the goods upon which the services have been performed, and that, delivery being outside New Jersey, the act does not apply. Defendant, on the other hand, argues that the tax is imposed upon receipts from repair services performed in New Jersey, and out-of-state delivery of the property upon which the services were performed is not relevant. I conclude that defendant's position is the correct construction of the statute.

N.J.S.A. 54:32B–3 imposes a tax upon:

. . . . . .

(b) The receipts from every sale, except for resale, of the following services:

. . . . . .

(2) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property . . . .

The term "sale" is broadly defined to include "the rendering of any service taxable under this act, for a consideration." *N.J.S.A.* 54:32B–2(f). The term "receipt" is defined to include "the charge for any service taxable under this act." *N.J.S.A.* 54:32B–2(d).

[18, 19] Ascribing to the words of the statute the ordinary meaning associated with them, and considering the transactional nature of the tax, I conclude that the repair services involved in this case are subject to the sales tax by reason of *N.J.S.A.* 54:32B–3(b)(2), regardless of the destination of the repaired property following completion of the services. When the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation. *Serodino, Inc. v. Woods,* 568 *S.W.*2d 610 (Tenn. Sup.Ct.1978); *Parish of Jefferson v. Ekco-Glaco,* 280 *So.*2d 629 (La.App.1973).

The legislative history of the act reinforces the conclusion that the repair services in issue here are subject to sales tax. The act was drawn from the corresponding New York Sales and Compensating Use Tax Law, *L.* 1965, *c.* 93; *McKinney's Consolidated Laws of New York Annotated,* § 1101 *et seq. New Jersey Bell Tel. Co. v. Taxation Division,* 152 *N.J.Super.* 442, 378 *A.*2d 38 (App.Div.1977), certif. den. 75 *N.J.* 594, 384 *A.*2d 824 (1978). The New York statute provided for imposition of the sales tax upon repair services in language substantially similar to the language of *N.J.S.A.* 54:32B–3(b)(2). The New York law, however, expressly exempted services performed upon tangible property delivered and used outside the state. § 1115(d). The New Jersey statute included no such exemption until the 1977 amendment (to be hereinafter discussed), notwithstanding the adoption in *N.J.S.A.* 54:32B–8 of many of the exemptions contained in the New York law.

[20, 21] Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate. *Bank of America v. Webster,* 439 *F.*2d 691 (9 Cir. 1971); *Re Walker's Will,* 258 *Wis.* 65, 45 *N.W.*2d 94 (Sup.Ct.1950); *Beckham v. Hartford Accident and Indem. Co.,* 137 *So.*2d 99 (La.App.1962). Indeed, all changes in words and phrasing in a statute adopted from another state are deemed deliberately made with the purpose of limiting, qualifying or enlarging the adopted rule. *Martin v. American Potash and Chemical Corp.,* 33 *Del.Ch.* 234, 92 *A.*2d 295 (1952); *Sutton v. Duke,* 277 *N.C.* 94, 176 *S.E.*2d 161 (Supreme Ct. 1970).

Section 3(b)(2) of the act, *N.J.S.A.* 54:32B–3(b)(2) was amended in 1977, *L.* 1977, *c.* 54, to exempt from sales tax the transactions in controversy here. The Statement of the Assembly

Committee on Taxation appended to the bill (Assembly Bill 1787) read:

> The bill proposes to exempt from the sales tax services performed by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations. The imposition of the tax is one which did not occur in the beginning years of the sales tax but was imposed by interpretation later. Such taxes, when assessed against New Jersey business, in many instances incur a loss because they are unable to collect from customers after the fact. [Emphasis Supplied]

Plaintiff points to the underscored sentence as evidence of the Legislature's intent to exempt the transactions in issue upon enactment of the act in 1966. I cannot agree.

[22, 23] To begin with, the amendment itself is indicative of a change in the law. It is a well established rule of statutory construction that a change of language in a statute implies a purposeful alteration in substance of the law. *Nagy v. Ford Motor Co.*, 6 *N.J.* 341, 78 *A.*2d 709 (1951); *Cold Indian Springs Corp. v. Ocean Tp.*, 154 *N.J.Super.* 75, 380 *A.*2d 1178 (Law Div.1977), aff'd 161 *N.J.Super.* 586, 392 *A.*2d 175 (App.Div.1978), rev'd on other grounds 81 *N.J.* 502, 410 *A.*2d 652 (1980); 1A *Sutherland, Statutory Construction* (4 ed. 1972), § 22.30 at 178. Secondly, the underscored sentence in the Assembly Committee on Taxation Statement is of little probative value in ascertaining the legislative intent at the time of the act's passage in 1966. Committee reports which are made after passage of the statute to be construed are of little value, and that value decreases with the elapse of time. 2A *Sutherland, op. cit.*, § 48.06 at 203. *Cf. First State Bank of Hudson Cty. v. United States*, 599 *F.*2d 558 (3 Cir., 1979), *cert.* den. 444 *U.S.* 1013, 100 *S.Ct.* 662, 62 L.Ed.2d 642 (1980) (subsequent Congress cannot speak for intent of earlier Congress in the enactment of a particular statute).

III. Constitutional Issues

A. *Due Process and Equal Protection*

Plaintiff claims a violation of the equal protection and due process provisions of the United States and New Jersey Constitutions, in that the act, as applied here, makes an irrational and arbitrary distinction between out-of-state sales of tangible personal property and services performed in New Jersey on property destined for out-of-state delivery, the former being immune from taxation while the latter is taxable.

[24–26] It is, of course, well settled that a state may not constitutionally impose a sales tax upon the sale of goods delivered to the buyer beyond the taxing state. *McLeod v. Dilworth,* 322 *U.S.* 327, 64 *S.Ct.* 1023, 88 *L.Ed.* 1304 (1944). *Cf. J. D. Adams Mfg. Co. v. Storen,* 304 *U.S.* 307, 58 *S.Ct.* 913, 82 *L.Ed.* 1365 (1938) (gross income tax on out-of-state sales held invalid). It does not necessarily follow, however, that services performed within the taxing state are likewise exempt if the serviced property is delivered beyond the state. The distinction implicitly made by the Legislature is within its constitutional power and does not violate the Equal Protection Clause, since there is a presumptively rational basis for the distinction. *Allied Stores of Ohio, Inc. v. Bowers,* 358 *U.S.* 522, 79 *S.Ct.* 437, 3 *L.Ed.*2d 480 (1959). States are given "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 *U.S.* 356, 359, 93 *S.Ct.* 1001, 1003, 35 *L.Ed.*2d 351 (1973). A strong presumption of constitutionality attends the legislative classification, *id.* at 364, 93 *S.Ct.* at 1006, and the party challenging it must negate "every conceivable" basis for the statute, since the statute must be upheld if any state of facts can be reasonably conceived to sustain it. *Allied Stores of Ohio, Inc. v. Bowers, supra* 358 U.S. at 528, 79 *S.Ct.* at 441; *Robbiani v. Burke,* 77 *N.J.* 383, 391-392, 390 *A.*2d 1149

(1978); *Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp.*, 80 *N.J.* 6, 39-40, 364 *A.*2d 1016 (1976).

[27] In the present case there is no basis for plaintiff's allegation of an irrational, arbitrary classification by the legislature. The imposition of the sales tax upon all repair services performed in New Jersey is eminently rational as the State's connection with the rendition of the service is exactly the same whether or not the property is delivered beyond the State.

So much for plaintiff's equal protection contention. Plaintiff's due process allegation may be dispatched even more summarily.

[28–30] The due process requirement is satisfied if there is some nexus, however minimal, between the activity to be taxed and the taxing state. *Wisconsin v. J. C. Penney,* 311 *U.S.* 435, 61 *S.Ct.* 246, 85 *L.Ed.* 267 (1940); *Miller Bros. Co. v. Maryland,* 347 *U.S.* 340, 74 *S.Ct.* 535, 98 *L.Ed.* 744 (1954). The protection afforded by the state requires that the activity bear a just share of the cost of state government. *Western Live Stock v. Revenue Bureau,* 303 *U.S.* 250, 58 *S.Ct.* 546, 82 *L.Ed.* 823 (1938). The aircraft engines were serviced and overhauled by plaintiff entirely within New Jersey and those engines, as well as the property in which they were stored, enjoyed the protection and services provided by state and local government so long as they remained here.

Plaintiff's equal protection and due proccess challenges are without merit.

B. *The Commerce Clause*

Plaintiff alleges a violation of the Commerce Clause of the United States Constitution, Article I, § 8, in that the act, as applied here, unlawfully subjects interstate transactions to an unapportioned direct tax.

[31–33] State taxation of interstate transactions does not violate the Commerce Clause if it operates to exact "from interstate commerce its fair share of the cost of state government." *Washington Dept. of Revenue v. Association of Washington Stevedoring Co's.*, 435 *U.S.* 734, 748, 98 *S.Ct.* 1388, 1398, 55 *L.Ed.*2d 682 (1978). The mere fact that, as in the present case, the transactions are the products of contracts between residents of different states, does not immunize the transactions from state or local taxation. *Western Live Stock v. Revenue Bureau, supra.* The fact that property which is the subject of the transaction is immediately transported out of the taxing state does not change the result. *State Tax Comm'n v. Pacific Cast Iron Pipe Co.*, 372 *U.S.* 605, 83 *S.Ct.* 925, 10 *L.Ed.*2d 8 (1963).

[34, 35] In *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* 274, 97 *S.Ct.* 1076, 51 *L.Ed.*2d 326 (1977), the Supreme Court ruled that a state tax is not an unconstitutional burden upon interstate commerce if (1) there is a sufficient nexus with the state to justify the tax, (2) the tax is fairly related to the benefits provided by the state to the taxpayer, (3) the tax does not discriminate against interstate commerce and (4) the tax is fairly apportioned to local activities. The act, as applied to the transactions here in issue, meets three of these four tests.

[36] The first two tests are covered in the foregoing discussion of plaintiff's equal protection and due process claims. The third test (nondiscriminatory treatment of interstate transactions) is satisfied if the tax places the same burden upon interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 *U.S.* 33, 60 *S.Ct.* 388, 84 *L.Ed.* 565 (1940). In this case the act applied to *all* receipts from repair services performed within New Jersey, regardless of whether the purchaser is a resident or non-resident and irrespective of the destination of the serviced property.

[37, 38] The fourth test (fair apportionment to local activities) is intended to avoid multiple taxation of the same transaction by two or more states. The vice to be avoided in the case of transactional taxes (such as sales or gross receipts taxes) is the potential that each state touched by the transaction has an equal right to impose a tax, so that, without protection of the Commerce Clause, the commerce would bear cumulative burdens not imposed upon local commerce. *General Motors Corp. v. Washington,* 377 *U.S.* 436, 84 *S.Ct.* 1564, 12 *L.Ed.*2d 430 (1964); *Western Live Stock v. Revenue Bureau, supra; J. D. Adams Mfg. Co. v. Storen, supra.* The taxpayer, however, has the burden of proving *actual* multiple taxation. *Standard Pressed Steel v. Revenue Dep't,* 419 *U.S.* 560, 95 *S.Ct.* 706, 42 *L.Ed.*2d 719 (1975); *General Motors Corp. v. Washington, supra.* A finding of duplicative taxes may not rest on speculative grounds. *Moorman Mfg. Company v. Bair,* 437 *U.S.* 267, 98 *S.Ct.* 2340, 57 *L.Ed.*2d 197 (1978). The fair apportionment test is satisfied if it appears that no other state could justifiably tax the transaction in question. *Fisher-Stevens, Inc. v. Taxation Division,* 121 *N.J. Super.* 513, 298 *A.*2d 77 (App.Div.1972), certif. den. 62 *N.J.* 575, 303 *A.*2d 328 (1973); *Corning Laboratories, Inc. v. Iowa State Revenue Dep't,* 270 *N.W.*2d 463 (Iowa Sup.Ct.1978). Moreover, the imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test. *International Harvester v. Treasury Dep't,* 322 *U.S.* 340, 64 *S.Ct.* 1019, 88 *L.Ed.* 1313 (1944); *Treasury Dep't v. Wood Preserving Corp.,* 313 *U.S.* 62, 61 *S.Ct.* 885, 85 *L.Ed.* 1188 (1941).

Conceivably, the states of destination of the overhauled or serviced aircraft engines impose sales, as distinguished from use taxes, on the purchasers of plaintiff's services on the basis that delivery, not performance of services, is the taxable event. Alternatively, those states—or some of them—might impose a sales tax on the repair parts used by plaintiff in its work on the

aircraft engines. (The affidavit of plaintiff's vice-president and general manager indicates that, typically, up to 80% of plaintiff's charges are attributable to the cost of parts used in overhauls.) *See State v. Communication Equip. & Contr. Co., Inc.*, 335 *So.*2d 123 (Ala.App.1976). Thus, there remains the possibility of actual duplicative taxation.

IV. Conclusion

The Administrative Procedure Act is inapplicable to the actions taken by defendant with respect to its publications in *State Tax News* and the disputed assessments of sales tax. Defendant's power to make assessments pursuant to the Sales and Use Tax Act is not contingent upon prior adoption of a rule attended by notice and public hearing.

Moreover, defendant's failure to comply with the notice and hearing requirements of the APA with respect to rule-making did not deprive plaintiff of due process, nor did its alleged detrimental reliance upon defendant's earlier position that the disputed transactions were nontaxable estop defendant from assessing and collecting the tax.

Both a sensible construction of the act and the legislative history thereof compel the conclusion that repair services performed within the State upon tangible personal property are subject to sales tax, regardless of the destination of the repaired property following completion of the services.

The aforementioned interpretation of the act violates neither the Due Process Clause nor the Equal Protection Clause of the New Jersey and United States Constitutions.

The act may be violative of the Commerce Clause of the United States Constitution upon a showing of actual duplicative taxation. As this issue was not covered by the summary judg-

ment motions, there remains an issue of material fact to be resolved at a trial. *R.* 4:46-2. The parties will be given an opportunity to submit proofs on this issue alone. Those proofs will be directed to the identification of the states to which the serviced aircraft engines were delivered, the nature and quantum of the taxes imposed by statutes of those states upon the transactions in issue here whether any such taxes were actually assessed, the extent of actual collection of such taxes, the applicable statutes of limitation upon assessment and collection of any such allegedly duplicative taxes (where those taxes are claimed to be due but remain unassessed or uncollected), and such other evidence as the parties deem germane to the issue of duplicative or multiple taxation. As stated earlier in this opinion, however, plaintiff bears the burden of proof with respect to such issue.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted with respect to all issues except the duplicative taxation aspect of the Commerce Clause issue, with respect to which defendant's motion is denied.

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued March 15, 1982—Decided April 28, 1982.

SYNOPSIS

Taxpayer appealed from an order and judgment of the Tax Court, 2 N.J.Tax 329, raising the issue of whether an assessment should extend only to the cost of labor, not to cost of parts. The Superior Court, Appellate Division, held that the taxpayer was precluded from raising the issue on appeal where the issue was neither raised in the petition of appeal through the former Division of Tax Appeals, nor incorporated as an issue in the pretrial order of the Tax Court, nor raised or argued in the cross motion for summary judgment, nor considered by the Tax Court in its opinion.

Affirmed.

Before Judges MILMED, JOELSON and GAULKIN.

Gerald C. Neary argued the cause for appellant *(Pitney, Hardin, Kipp & Szuch,* attorneys).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *James R. Zazzali,* former Attorney General of New Jersey, *Erminie L. Conley,* former Assistant Attorney General, and *Harry Haushalter,* on the brief.)

PER CURIAM.

The order and judgment under review are affirmed substantially for the reasons expressed by Judge Crabtree in his written opinion for the Tax Court of March 27, 1981, 2 *N.J. Tax* 329 and in light of the determination of plaintiff-appellant to forego the opportunity to submit proofs on the issue of "duplicative taxation" referred to therein.

Additionally, we need give no consideration here to plaintiff's contention, raised for the first time on this appeal, that "[e]ven if valid, the assessment should extend only to the cost of labor, not to the cost of parts." The Attorney General, in his brief on behalf of defendant-respondent Director of the Division of Taxation, notes that

> . . . This issue was neither raised in the petition of appeal [to the former Division of Tax Appeals] nor incorporated as an issue in the pretrial order [of the Tax Court], nor raised or argued in the cross-motions for summary judgment, nor considered by the trial court in its opinion. The defendant has never been accorded an opportunity to address this issue at the trial court level and, therefore, has never had the opportunity to rebut the plaintiff's allegation that a significant portion of the receipts are non-taxable because they related to the sale of parts.
>
> This issue, which is clearly raised as an afterthought at this late date, requires a thorough factual analysis as to the nature of the parts involved, the extent to which such parts were previously repaired or restored by Airwork in New Jersey, the manner in which Airwork acquired such parts, the condition such parts were in at the time of acquisition and the relative value of Airwork's skill in using such parts to repair complex machinery. . . .

The Attorney General properly concludes that:

> . . . Airwork was clearly required to timely-raise below the issue as to the sale of parts and, thereby, allow for the compilation of a full factual record on this question. Having failed to raise this issue below, Airwork is now precluded from raising this issue on appeal.

See *State v. Souss*, 65 *N.J.* 453, 460, 323 *A.*2d 484 (1974); *Nieder v. Royal Indemnity Insurance Co.*, 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973).

Affirmed.

METROMEDIA, INC., PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Argued November 7, 1983—Decided July 23, 1984

SYNOPSIS

Out-of-state corporation owning five television and radio stations located out of state challenged Director of Division of Taxation's authority to assess corporate business tax against it based on corporation's share of local audience. The Tax Court, 3 N.J.Tax 397, struck down allocation factor as invalid rule making, and Director appealed. The Superior Court, Appellate Division, Furman, J.A.D., 187 N.J.Super. 562, reversed, and corporation petitioned for certification. The Supreme Court, Handler, J., held that: (1) Director's adoption of audience share method to assess tax on corporation was a fair and proper method for effecting reasonable attribution of revenues to state, and thus, was within authority of Director, but (2) Director's determination constituted a rule, the adoption of which required compliance with statutory rule-making procedures, since determination was clearly one of general applicability to regulated class; therefore, action taken by Director in assessing corporation was invalid absent prior promulgation of rules in compliance with Administrative Procedure Act.

Appellate Division's judgment reversed and Tax Court judgment affirmed.

Wilentz, C.J., and Pollock and O'Hern, JJ., filed dissenting opinion.

Joseph P. LaSala argued the cause for appellant (*Robinson, Wayne, Levin, Riccio & LaSala*, attorneys; *Kenneth Greene*, of counsel; *Mr. LaSala* and *Lawrence P. Platkin*, on the briefs).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by

HANDLER, J.

This case involves the validity of a tax deficiency assessment made by the defendant, Director, Division of Taxation (Director), against plaintiff, Metromedia, Inc., under the New Jersey Corporation Business Tax Act, *N.J.S.A.* 54:10A-1 to -40 (Act). Metromedia, Inc. (Metromedia or taxpayer) is a Delaware corporation engaged in the ownership and operation of television and radio stations. In determining the net business receipts of the taxpayer attributable to its operation in the state pursuant to the Act, the Director used a calculation referred to as an "audience share." This calculation is designed to measure receipts attributable to New Jersey by relating the taxpayer's revenues to its listening and viewing audiences in the state. However, this method for determining the New Jersey receipts of a multi-state television or radio enterprise had not been used by the Director before its application to Metromedia in this case. The major issue, therefore, is whether the decision to use this factor in effect constitutes administrative rule-making, within the meaning of the Administrative Procedure Act, *N.J.S.A.* 52:14B–1 to –15 (APA), necessitating compliance with the statutory requirements of the APA governing the adoption of agency rules. We must also examine the issue of whether the Act itself, in the absence of an implementing regulation, authorizes

the allocation of receipts by the use of the "audience-share" factor.

I

Metromedia has filed corporate business tax returns since 1957, but disputes the deficiencies assessed against it only for the years 1972–1975. During those years, Metromedia owned and operated several television and radio stations, including stations WNEW–TV, WNEW–AM, and WNEW–FM, located in New York City[1] and serving the New York metropolitan area, and WIP–AM and WMMR–FM, located in Philadelphia[2] and serving the Philadelphia metropolitan area. Metromedia earns revenue from the sale of network air-time to national and local advertisers represented by advertising agencies. Most of these agencies are located in New York City, and, for present purposes, none is situated in New Jersey. Rates charged for advertising are based primarily on the size of the listening or viewing audience in the area served by the station.

No activity in connection with advertising sales or receipts occurred in New Jersey. Consequently, for the years in question the taxpayer reported no advertising revenues from these stations as attributable to the state. The Director, however, during its 1978 audit, allocated some of Metromedia's business receipts to New Jersey by applying a factor called "audience share."

[1] All three stations' offices are located in New York City. All sales contracts were approved in New York and all commercials were aired from the New York locations of the stations. Only WNEW-AM maintained property in New Jersey. Its transmitter facility in Carlstadt consisted of a concrete blockhouse and four broadcast towers and was maintained and serviced by three full-time shift employees.

[2] Both stations' offices are located in Philadelphia, where the commercials are aired. All sales contracts are approved in New York. During the relevant time period, only WIP-AM maintained property in New Jersey. Its transmitter facility, located in Bellmawr, consisted of a concrete blockhouse and two broadcast towers, and Philadelphia-based employees performed part-time maintenance work at the site.

This calculation purported to reflect New Jersey earnings that the Director claimed were generated by virtue of the stations' signals reaching audiences in the state. For each station reaching New Jersey, the Director multiplied Metromedia's total receipts by a fraction or percentage that consisted of a ratio of the station's New Jersey audience to its total audience. The sum of these results for each of the five stations reaching New Jersey audiences was then incorporated into the statutory formula used to determine the taxpayer's New Jersey franchise tax base, consisting of both net worth and net income.

The taxpayer sought review of this determination in the Tax Court, challenging the Director's authority to set and apply the allocation factor. The Tax Court ruled that the "audience share" concept in effect constituted a "rule," within the meaning of the APA, and therefore its adoption by application in this case was invalid because it failed to comply with the requirements applicable to the promulgation of agency rules. 3 *N.J.Tax* 397 (1981). Because of its disposition on this ground, the Tax Court did not address contentions that the Act was unconstitutionally vague and therefore violative of the Due Process Clause. 3 *N.J.Tax* at 405–06. The court concluded, however, that the statute "[does not] support the use of an audience factor in the absence of an administrative rule, properly adopted* * *." *Id.* at 412–13.

The Director appealed and the Appellate Division reversed, finding that the Director's actions were authorized by the Act. 187 *N.J.Super.* 562, 564 (1983). We granted Metromedia's petition for certification to consider whether the Director's action was invalid for failure to comply with the APA, and whether the Director's use of an audience factor exceeded his discretionary authority under the Act. 97 *N.J.* 290 (1983).

II

The New Jersey Corporation Business Tax Act imposes a franchise tax on all nonexempt foreign and domestic corporations that exercise a corporate franchise, do business, employ or own capital or property, or maintain an office in New Jersey. *N.J.S.A.* 54:10A–2. The tax is computed by reference to the taxpayer's net worth tax base and net income base. *N.J.S.A.* 54:10A–5; *see Fedders Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376 (1984). The receipts or revenues of the taxpayer that are considered in the net income tax base for tax purposes are those that arise from (1) sales of tangible personal property from within this state, (2) services performed within the state, (3) rentals from property and royalties from the use of patents or copyrights within the state, and (4) all other business receipts that are earned within the state. *N.J.S.A.* 54:10A–6(B)(6).

For corporations that maintain a regular place of business outside of New Jersey, the Act recognizes that only a percentage of the taxpayer's net worth and net income may be the result of its activities in the state. Consequently, an "allocation" formula is applied to both the net worth and net income tax bases so that only those portions of net worth and net income, respectively, that are fairly attributable to the corporation's activities in New Jersey are used in the measure of the tax. *N.J.S.A.* 54:10A–6. The allocation formula consists of three factors, namely, property, payroll and receipts. Each of the three factors in the so-called three-ply formula is expressed as a fraction, the numerator of which is, respectively, the taxpayer's New Jersey property, receipts, and payroll, and the denominator of which is the taxpayer's total property, receipts, and payroll generated by the operations of the entire enterprise. *N.J.S.A.* 54:10A–6(B). These fractions are averaged, and the combined fraction is then applied to the taxpayer's total net worth and net income in order to determine the percentage or portion of net worth and income properly attributable, and thus taxable, to New Jersey. *Id.*

[1] It is the implicit premise of the Act that the statutory three-ply formula can only approximate the taxpayer's true net worth and income generated by its New Jersey activities. Hence, the Act gives the Director broad authority to adjust the allocation factor in order to reflect more accurately and fairly the activity, business, receipts, capital, entire net worth, or entire net income of a taxpayer reasonably referable to the state. *N.J.S.A.* 54:10A–8 authorizes the Director to make the following particular adjustments: (1) to adhere to those factors already set forth in the statutory formula, namely, property, receipts, and payrolls; (2) to include in the formula one or more other acceptable recognized factors, such as expenses, purchases, or existing contracts; and (3) to exclude one or more assets from the formula or from the entire net worth tax base. In addition to this specific authority, the Director is given broad general discretion to "apply* * * any other similar or different method calculated to effect a fair and proper allocation of the entire net income and the entire net worth reasonably attributable to the State." *Id.*

As noted, the Director used the "audience share" as a modification of the "receipts factor" of the three-ply formula in order to adjust the percentage of the taxpayer's total receipts allocable to New Jersey. Metromedia contends that the Director's determination was not authorized by any provisions of the Act and exceeded the Director's statutory discretion.[3] The argument is that the use of the "audience factor" is *ultra vires*. We disagree.

[2, 3] Clearly, the language of the statute vests broad authority in the Director to determine what income-producing activity of the taxpayer is reasonably referable to its business in

[3] In this case, the new allocation factor, consisting of the audience factor, was a result solely of an adjustment to the numerator of the receipts fraction. No adjustment was made to the denominator of the receipts fraction or to the numerators or denominators of the payroll and property fractions. See discussion, *supra* at 323.

New Jersey, so that this income can appropriately be used in the measure of the franchise tax. The statutory scheme recognizes that this is a highly specialized decision that entails considerable discretion. *See Fedders, supra,* 96 *N.J.* 376. The Director's discretion is bound by standards of "sound accounting principles." *N.J.S.A.* 54:10A–8(e); *R.H. Macy & Co., Inc. v. Director, Div. of Taxation,* 77 *N.J.Super.* 155 (App.Div.1962), aff'd o.b., 41 *N.J.* 3 (1963). It is nonetheless as broad as necessary to enable the Director to determine the fair value of the taxpayer's net worth, *Hawthorne Fabrics v. Kingsley,* 41 *N.J.* 521 (1964), as well as the percentage of net worth and net income that can be attributed to New Jersey, *F.W. Woolworth v. Director, Div. of Taxation,* 45 *N.J.* 466 (1965); *see Household Fin. Corp. v. Director, Div. of Taxation,* 36 *N.J.* 353 (1962).

The broad question of statutory interpretation can be narrowed to whether the use of an audience-share factor to determine the taxpayer's "receipts earned within the State" would constitute any "other similar or different method" of allocation that is made available to the Director under *N.J.S.A.* 54:10A–8(e) to fashion an accurate allocation factor. A "similar method" would presumably be one comparable to the allocation methods specified under the allocation formula in *N.J.S.A.* 54:10A–8(e), namely, receipts, property, and payroll. By example, the Director is specifically empowered to include in the formula, as an "acceptable recognized factor," the value of existing contracts, if in a given case this were relevant in the operation of a particular enterprise. *N.J.S.A.* 54:10A–8(b).

Here, the relevance of the listening and viewing audience of a broadcast enterprise as an allocation factor may be premised on its obvious relationship to the enterprise's "customers". Its utility as an allocation factor applicable to the income of the entity inheres in its perceived correlation to advertising revenues. Consequently, if it is reasonable to presume a relationship between the size of the taxpayer's audiences and its advertising

revenues, then a factor measuring or attributing revenues in terms of audience size would not facially be unsound or arbitrary.[4] These considerations influenced the Tax Court, which said:

> Each of plaintiff's New York and Philadelphia radio and television stations transmitted a signal that reached a specified geographical area known as a "primary coverage area." All five of the stations had a primary coverage area that included areas within New Jersey. For the tax years in question approximately 30% of the total listening and viewing audience in primary coverage areas for WNEW–TV, WNEW–AM and WNEW–FM, and approximately 21% of the total listening audience in the primary coverage areas for WIP–AM and WMMR–FM, was located in New Jersey. Although there was no specific proof in this regard, it can logically be assumed that the stations' advertisers most likely considered the entire geographical makeup of the stations' audiences in their decision to purchase advertising time. [3 *N.J. Tax* at 401.]

Even if it is debatable that an "audience share" is a "similar method" or an "acceptable recognized factor," *N.J.S.A.* 54:10A–8(e) authorizes the Director to adopt a "different method" if it serves to effect "a fair and proper allocation" of the taxpayer's tax base "reasonably attributable to the State." Hence, if the resultant allocation can be considered "fair and proper," and the revenues so calculated can be regarded as "rea-

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[1] As presented by the Tax Court, 3 *N.J.Tax* at 403, the taxpayer's calculation of the allocation fraction, in accordance with the statutory formula, was:

	1972	1973	1974	1975
Property fraction	3.5083%	3.0654%	2.740 %	2.6544%
Payroll fraction	.1389	.1251	.171	.0903
Receipts fraction	–0–	–0–	–0–	–0–
Allocation factor (average of the three fractions)	1.2157%	1.0635%	.9703%	.9149%

The Director's calculation of the allocation fraction, 3 *N.J.Tax* at 404, modifying the receipts factor by the "audience share," was:

	1972	1973	1974	1975
Property fraction	3.5083%	3.0654%	2.740 %	2.6544%
Payroll fraction	.1389	.1251	.171	.0903
Receipts fraction	6.8343	6.6831	6.4722	6.5996
Allocation factor	3.4938%	3.2912%	3.1277%	3.1148%

sonably attributable to the State," the discretionary use of the "audience factor" would be authorized.[5]

There is some extrinsic evidence that an audience factor, applied to taxpayers engaged in the television and radio industry, can be regarded as a fair and proper method for effecting a reasonable attribution of revenues to the state. This method of measuring or attributing "receipts" was suggested in the *Report of the New Jersey Tax Policy Committee, Part V* (Tax Policy Report), submitted to Governor Cahill on February 23, 1972. The Committee observed that the Act empowered the State to tax foreign corporations and recognized that the tax scheme authorized the taxation of corporations whose activities might not squarely fit into the conventional application or understanding of the three-factor allocation formula.

> [T]here is a need for an overall review of the applicability and impact of the general apportionment formula to a number of specialized businesses, with a view toward the adoption of apportionment methods that would be more appropriate to these businesses.* * * [Tax Policy Report at 31.]

Significantly, the Committee further stated:

> [T]he receipts factor, geared to sales of tangible property, is not adapted to television and radio stations, with a consequence that probably little or no receipts allocation would be made to this State. In lieu of the receipts allocation contained in the general formula, a more realistic and more economically justifiably [*sic*] technique might be the allocation of receipts by reference to the listening audience. It is our understanding that this is the way television and radio time charges are determined, so

[5] According to the Tax Court, the difference in the computation of the taxpayer's tax base by using the audience share was illustrated by the 1972 tax year. In 1972 WNEW-TV had overall receipts of $22,682,000, and 29.1% of its audience was ascribed to New Jersey. The Director attributed $6,600,462 to New Jersey receipts. Adding this amount to the products of similar calculations for the other four stations, the Director determined that Metromedia's 1972 New Jersey receipts totalled $10,039,489 and concluded that Metromedia's receipt fraction under *N.J.S.A.* 54:10A-6(B) was 6.8343% ($10,030,489/$146,896,667 (Metromedia's absolute total 1972 receipts)). 3 *N.J.Tax* at 404.

that receipts allocation by reference to the advertising market would respond to the economic realities of the business. [*Id.* at 31, 32].

[4, 5] The use of the audience-share factor seems reasonable. As the Tax Policy Report noted, such an interpretation better accommodates to the economic realities of the broadcast business, in terms of attribution of revenues.[6] We have recognized that the Director's expertise, particularly when exercised in the specialized and complex area covered by these provisions of the Act, is entitled to great respect by the courts. *See, e.g., F.W. Woolworth v. Director, Div. of Taxation, supra,* 45 *N.J.* 466; *Household Fin. Corp. v. Director, Div. of Taxation, supra,* 36 *N.J.* 353; *R.H. Macy & Co., Inc. v. Director, Div. of Taxation, supra,* 41 *N.J.* 3. Moreover, the agency's interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable. *New Jersey Guild of Hearing Aid Dispenser's v. Long,* 75 *N.J.* 544 (1978); *Atlantic Transp. Co. v. Director, Div. of Taxation,* 12 *N.J.* 130 (1953). Accordingly, we conclude that in the case of a multi-state television and radio station enterprise whose broadcast operations cover audiences in New Jersey, the Act permits the discretionary choice by the Director to compute the corporate taxpayer's receipts attributable to New Jersey by the application of a factor based upon an "audience share" in this state.

III

The critical issue in this case is whether the agency determination to apply the audience share factor in allocating taxpayer's

[6] Apparently, New York State, prompted by concerns similar to those expressed in the Tax Policy Report, authorized the use of an "audience-share" factor. *Conde Nast Publications, Inc. v. State Tax Comm'n,* 51 *A.D.*2d 17, 378, *N.Y.S.*2d 132 (1976) appeal dismissed, 39 *N.Y.*2d 889, 386 *N.Y.S.*2d 393, 352 *N.E.*2d 580 (1976); *Capital Cities Communications, Inc. v. State Tax Comm'n,* 65 *A.D.*2d 25, 411 *N.Y.S.*2d 46 (1978). See discussion *infra,* at 335.

receipts to New Jersey encompassed *de facto* rule-making and, if so, whether that determination, in order to be valid, had to comply with the requirements governing the promulgation of administrative rules as provided by the APA. Basing its argument upon the statutory definition of "rule" under the APA, *N.J.S.A.* 52:14B-2(e), Metromedia claims that the "audience share factor" that was applied by the Director is tantamount to an agency law or regulation—it constitutes a formal expression or statement of administrative policy effectuating the agency's statutory authority, and, consequently, it must be considered an administrative rule.

Resolution of this issue involves a consideration of the nature of a "rule" as it affects administrative agency policy-making and regulation. *See generally* Mayton, "The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking," 1980 *Duke L.J.* 103 (1980). *N.J.S.A.* 52:14B–2(e) provides:

> (3) "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy* * *.

[6] There are several important elements of agency action that in combination serve to define it as either an administrative rule or an administrative adjudication. A critical aspect of this definition is the "general applicability and continuing effect" of the pronouncement. *Id.; see, e.g., Crema v. New Jersey Dept. of Envtl. Protection,* 94 *N.J.* 286 (1983); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n,* 85 *N.J.* 325, 337 (1981) (Handler, J., concurring); *Boller Beverages, Inc. v. Davis,* 38 *N.J.* 138 (1962); *Glaser v. Downes,* 126 *N.J. Super.* 10 (App.Div. 1973), certif. den. 64 *N.J.* 513 (1974); *see also Securities & Exchange Comm'n v. Chenery Corp.,* 332 *U.S.* 194, 67 *S.Ct.* 1575, 91 *L.Ed.* 1995 (1947); *N.L.R.B. v. Wyman-Gordon Co.,* 394 *U.S.* 759, 777, 89 *S.Ct.* 1426, 1435, 22 *L.Ed.*2d 709, 721 (1969)

(Douglas, J., dissenting). It has been consistently recognized that the widespread, continuing, and prospective effect of an agency pronouncement is the hallmark of an "administrative rule." *See* Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 *Harv.L.Rev.* 921, 929–42 (1965); Robinson, "The Making Of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedure Reform," 118 *U.Pa.L.Rev.* 485, 513–28 (1970).

[7] An agency determination that is intended to be applied as a general standard and with widespread coverage and continuing effect can also be considered an administrative rule if it is not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute. *See Crema, supra,* 94 *N.J.* at 301; *cf. Airwork v. Director, Div. of Taxation,* 97 *N.J.* 290 (1984) (where tax statute is sufficiently specific, determination in the form of a tax assessment does not require antecedent rule); *R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3 (when adequate legislative standard exists for administrative guidance, general rule is not required). For example, in *Boller Beverages, Inc., supra,* 38 *N.J.* 138, this Court held that a determination by the Director of the Division of Alcoholic Beverage Control regarding the packaging and labelling of corn whiskey was neither authorized by sufficiently specific statutory language nor by any implementing regulation. The Court stressed the intended, general applicability of the Director's determination and observed that "[w]here an administrative agent is given full rule-making power, he must, in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate, either statutory or administrative, must precede the specific violation." *Id.* at 155.

[8] Further, when the agency action is concerned with "broad policy issues" that affect a large segment of the regulated or general public, rule-making as such is implicated. *Crema, supra,* 94 *N.J.* at 301–02. The APA itself recognizes that an agency action or determination "that implements or interprets law or policy" can constitute an "administrative rule." *N.J.S.A.* 52:14B–2(e). It is particularly appropriate that parties affected by the proposed agency action have the opportunity to participate in the process leading to the agency determination. *Bergen County Pines Hosp. v. Dept. of Human Services,* 96 *N.J.* 456 (1984); *see also Historic Green Springs, Inc. v. Bergland,* 497 *F.Supp.* 839, 854 (E.D.Va.1980) ("[W]ithout published rules of procedure and substantive criteria for [the taking of the proposed action, affected parties] have been denied any meaningful opportunity for informal response to the proposed action").

[9, 10] Similarly, an agency determination can be regarded as a "rule" when it effects a material change in existing law. *See Crema, supra,* 94 *N.J.* at 302; K.C. Davis, *Administrative Law Treatise* § 7:25 at 186 (2d ed. Supp. 1982); *Ford Motor Co. v. Fed. Trade Comm'n,* 673 *F.*2d 1008, 1009 (9th Cir.1981), *cert.* den., 459 *U.S.* 999, 103 *S.Ct.* 358, 74 *L.Ed.*2d 394 (1982) (an agency determination that changes existing law and has widespread application must be addressed by rule-making and not adjudication). This feature relates not only to fairness to the individual party actually before the agency but to other persons as well. When an agency's determination alters the *status quo,* persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination. *See Bergen County Pines Hosp., supra,* 96 *N.J.* at 469; *Crema, supra,* 94 *N.J.* at 303; *Boller Beverages, Inc., supra,* 38 *N.J.* at 151.

[11, 12] We have also recognized that the factfinding process that characterizes rule-making is much more flexible and expansive than that governing quasi-judicial adjudication. Where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rule-making procedures should be invoked. *See Dougherty v. Dept. of Human Servs.*, 91 *N.J.* 1 (1982); *Texter v. Dept. of Human Servs.*, 88 *N.J.* 376 (1982). The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that sould surround the ultimate agency determination. *See Crema, supra*, 94 *N.J.* 286. These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information, the admission of evidence without regard to conventional rules of evidential admissibility, and the opportunity for continuing comment on the proposed agency action before a final determination. *See N.J.S.A.* 52:14B–4.

[13, 14] We can synthesize from this authority that an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) con-

stitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.

[15] We acknowledge that in many cases the question of whether the agency determination is a rule or an adjudication is a close one. Frequently, the agency determination is a hybrid, partaking of both the rule-making and adjudicatory mode. *See Bally Mfg. Corp., supra,* 85 *N.J.* at 341–43 (Handler, J., concurring) (recognizing procedures for "specific rule-making"; rule making may be appropriate even when proposed rule has special impact upon particular parties as well as the public). The inquiry can be further clouded because we have noted that an agency can promulgate a rule that is highly particularized, constituting, in effect, "individualized rule-making." *Id.; see Bergen County Pines Hosp., supra,* 96 *N.J.* 456, 476; *Boller Beverages, Inc., supra,* 38 *N.J.* 138, 151–52. Other agency proceedings that involve contested, quasi-judicial hearings effectuate agency regulatory jurisdiction and can be characterized as "generalized adjudication." *See, e.g., R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3; *see also In re Uniform Admin. Procedural Rules,* 90 *N.J.* 85, 92 (1982). Nevertheless, rule-making and adjudication are not interchangeable. If the several relevant features that typify administrative rules and rule-making weigh in favor of action that is quasi-legislative in character, rather than quasi-judicial or adjudicatory, that balance should determine the procedural steps required to validate the ultimate agency action.

In the instant case, the Director claims that *N.J.S.A.* 54:10A–8 empowers him to adjust the allocation factor determined pursuant to *N.J.S.A.* 54:10A–6. He maintains that his

determination—rendered as an *ad hoc* decision resulting in an adjudication in a contested case—was sufficiently specifically authorized by the Act so as to obviate the need for any additional implementing regulations. *See Equitable Life Mortgage & Realty Investors v. Div. of Taxation,* 151 *N.J.Super.* 232, 240 (App.Div.1977), certif. den., 75 *N.T.* 535 (1977).

The Appellate Division agreed, 187 *N.J.Super.* at 565, and reversed the Tax Court's conclusion that, absent agency rules or regulations, the Director lacked the authority to assess a deficiency based upon the audience share factor. The Appellate Division relied on *R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3, where the court upheld the Director's action in adjusting, without any implementing regulations, the method of valuing Macy's inventory for purposes of computing net worth under *N.J.S.A.* 54:10A–4(d). Although *R.H. Macy & Co., Inc., supra,* supports the general proposition than an ageny may make decisions with substantive effect without prior promulgation of a rule or regulation, there were two features that supported that result. One was the recognition that the determination might not be of unvarying application in all similar cases. The other was the accepted adequacy and specificity of the legislative standard in guiding the particular administrative decision. *Id.* In *Airwork, supra,* 97 *N.J.* 290, decided today, we reached a similar conclusion, holding that where the tax statute addressed the transaction with sufficient specificity, an implementing rule was not a prerequisite to the exercise of the Director's statutory authority.

It does not follow that, because the Director has statutory discretion, the *manner* in which this discretion is exercised is not governed by the standards that determine whether rule-making or adjudication must be followed in a given case. We have acknowledged that this procedural choice itself is highly discretionary, and that agencies have wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdic-

tion. *See Bally Mfg. Corp., supra,* 85 *N.J.* at 338 ("Administrative agencies enjoy a great deal of flexibility in the proceedings most suitable to achieving their regulatory aims."); *Heir v. Degnan,* 82 *N.J.* 109, 121 (1980). Further, we have noted that both the rule-making and the adjudicatory mode serve to effectuate legislative and administrative policy, *In re Uniform Admin. Procedural Rules, supra,* 90 *N.J.* at 92. Nevertheless, this discretion is not unbounded. *See N.J.S.A.* 52:14B–2(b), (c), (e). The standards that we have developed set its outer limits and control the choice of proceedings. *See, e.g., Crema, supra,* 94 *N.J.* at 299 ("When the agency is concerned with "broad policy issues" that affect the public-at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is intended to have wide application and prospective effect, rule-making becomes the suitable mode of proceeding."); *Boller Beverages, Inc., supra,* 38 *N.J.* at 155; *see also N.L.R.B. v. Bell Aerospace Co.,* 416 *U.S.* 267, 294, 94 *S.Ct.* 1757, 1771, 40 *L.Ed.*2d 134, 154 (1974) ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act.").

[16] In balancing the relevant factors before us, we are satisfied that the instant agency determination constituted a rule, and that its adoption required compliance with statutory rule-making procedures. The challenged determination clearly is one of general applicability to the regulated class. It is essentially prospective in nature, notwithstanding its attempted application to the taxpayer in this case. It was intended to have continuing effect, since, as the Director conceded, the audience share factor applies to all other broadcasters similarly situated to Metromedia. The Director admitted at trial that "[a]ll broadcasters* * * who are in the same predicament or situation as [Metromedia] would be subject to the revision." There is no question, therefore, that the determination is intended to be a rule of unvarying application to all similar cases.

[17] Further, the determination was not otherwise expressly provided for by the statute, nor was it clearly and obviously implied. On this point, we note that the New York State courts, in *Conde Nast Publications, Inc. v. State Tax Comm'n, supra,* 51 *A.D.*2d 17, 378 *N.Y.S.*2d 132, and *Capital Cities Communications, Inc. v. State Tax Comm'n, supra, 65 A.D.*2d 25, 411 *N.Y.S.*2d 46, rejected the argument that the express language of the New York legislation empowering the tax commission to adjust the allocation percentage (based upon the three factors of payroll, property and receipts, *N.Y.Tax Law* § 210(3)(a)), authorized the substitution of an audience share approach. Significantly, the New York legislation, *N.Y.Tax Law* § 210(8) (McKinney 1979), which so empowers the tax commission, contains language that is virtually identical to the language of *N.J.S.A.* 54:10A–8(e). Subsequently, the New York authority enacted regulations, *N.Y.Tax Reg.* § 4–4.3(f)(2), pursuant to New York's Administrative Procedure Act, which provide for the use of an audience share factor when calculating the receipts fraction.

[18] In addition, the Director's determination reflects an interpretation of the enabling law and constitutes a decision on administrative policy, comporting with the general definition of a rule under the APA, *N.J.S.A.* 52:14B–2(e). The resolution of issues implicated in such a determination is made most appropriately by invoking procedures designed for the adoption of administrative rules. *See Dougherty v. Dept. of Human Servs., supra,* 91 *N.J.* 1; *Texter v. Dept. of Human Servs., supra,* 88 *N.J.* 376. That did not occur in the proceedings leading to the Director's determination here. The Tax Court recognized that while the audience factor was conceptually reasonable as related to the allocation of revenues, "there was no specific proof in this regard." 3 *N.J.Tax* at 414. Also, it is of some significance that the Committee on State Tax Policy, in its review of the Act and the allocation tax policy formula, believed that the subject mat-

ter was legislative or quasi-legislative in character and therefore suitable for rule-making. It "recommend[ed] that the Standing Committee of Tax Legislation * * * *"

> review the existing apportionment formula and practices, as applied to specialized industries; that it analyze the amount of revenues collected from such industries; and devise and *recommend*, where appropriate, the *enactment of legislation or the promulgation of regulations of apportionment and allocation methods*, which will more fairly reflect the activities, income and net worth, of such industries attributable to the State. [Tax Policy Report at 32 (emphasis added).]

[19] Further, the agency determination did not itself arise from the development of an evidential record that characterizes adjudication. The Tax Court's discussion of the agency's adoption of the audience share factor and its application to Metromedia in the form of a tax assessment instructively draws the distinction between a "rule" and an adjudicatory "finding."

> The audience factor adopted by defendant * * * is * * * an agency statement that will apply generally to all similarly situated broadcasters, and which implements and interprets both law and public policy. It does not, as defendant maintains, come within the exclusion for "agency decisions and findings in contested cases." This is so because the audience factor employed by defendant represents neither a decision nor a finding of the Division of Taxation. All that can be properly characterized as a decision or finding is defendant's ultimate conclusion as to plaintiff's liability. The audience factor was * * * a rule of general applicability employed by defendant to permit him to make findings and render a decision in this case. Defendant's "decision" * * * was that plaintiff owed additional franchise taxes for the tax years in question, and not that an audience factor is the proper tool with which to allocate such taxes for an out-of-state broadcaster such as plaintiff. [3 *N.J.Tax* at 406.]

Consequently, the Director's determination is not excepted from the APA definition of a rule as an "agency finding in [a] contested case." *N.J.S.A.* 52:14B–2(e).

[20] *N.J.S.A.* 54:10A–27 empowers the Director to implement rules and regulations in conjunction with the statutory authority. The broad language of *N.J.S.A.* 54:10A–8(e) and the subject matter of the agency's proceedings involved in

this case offer a prime example of where "[t]he function of filling in the interstices of [legislation] should be performed, as much as possible, through [the] * * * promulgation of rules to be applied in the future." *Securities & Exchange Comm'n v. Chenery, supra,* 332 *U.S.* at 202, 67 *S.Ct.* at 1580, 91 *L.Ed.* at 2002. The necessity, as well as desirability, of administrative rule-making in this context is supported by this Court's reasoning in *Boller Beverages, Inc., supra,* 38 *N.J.* at 151–52:

> The theory of administrative rule-making is, of course, that in certain fields and in certain respects the public interest is better served by delegating a large part of detailed lawmaking to the expert administrator, controlled by policies, objects and standards laid down by the legislature, rather than by having all the details spelled out through the traditional legislative process. Administrative rule-making remains in essence, however, the enactment of legislation of general application, prospective in nature. The object is not legislation *ad hoc* or after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards, administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.

This reasoning applies with similar force to the agency action that is the subject of this appeal. Accordingly, we find that the action taken by the Director, despite reliance upon statutory authority, is nonetheless invalid absent the prior promulgation of rules in compliance with the Administrative Procedure Act. *See Crema, supra,* 94 *N.J.* at 299.

IV

In conclusion, we recognize that the language of the New Jersey Corporation Business Tax Act grants the Director needed

broad authority to modify the statutory formula for determining a multi-state taxpayer's New Jersey tax base by which the tax is measured. In a case such as this, involving a multi-state radio and television enterprise reaching audiences in several states, the language of the statute supports the determination of a more realistic method than provided by the statutory three-ply formula to calculate the receipts of the taxpayer that can fairly and reasonably be attributable to its activities in New Jersey. The "audience factor" is based upon a presumed economic correlation between revenues derived from advertising over the taxpayer's network and the size and location of its viewing and listening audiences. It would constitute a fair and appropriate method for allocating revenues. The actual determination to use such an allocation method, however, requires implementing regulations and recourse to rule-making procedures.

In reaching this conclusion, we have noted but determined not to address taxpayer's constitutional claims. The record is insufficient with respect to these claims, the lower courts did not resolve them, and, in light of our determination requiring further administrative proceedings, these claims may again be asserted. These considerations reinforce the Tax Court's conclusion that the Director's determination, in the form of the tax assessment against Metromedia, and the adoption of the audience share factor to make this assessment, applied without complying with the requirements of the APA governing the promulgation of administrative rules and regulations, was invalid.

Accordingly, the Appellate Division's judgment is reversed and the Tax Court judgment is affirmed.

Reversed.

WILENTZ, Chief Justice, and POLLOCK and O'HERN, Justices, dissenting:

We would affirm the judgment of the Appellate Division, substantially for the reasons expressed by Judge Furman in his opinion reported at 187 *N.J.Super.* 562.

For reversal—Justices CLIFFORD, SCHREIBER, HANDLER and GARIBALDI—4.

For affirmance—Chief Justice WILENTZ and Justices POLLOCK and O'HERN—3.